

expected from the underlying technology as configured by the BIAP for that service.⁶⁶ The rule should require BIAPs to explain concepts like “effective download speeds, upload speeds, latency, and packet loss” and disclose all network practices and performance characteristics associated with the end user’s chosen service. Establishing a standardized label such as the one proposed by the Open Internet Advisory Committee⁶⁷ would seem an efficient means of disclosure that would ensure uniformity among and by all BIAPs. Finally, CCIA favors disclosures that are easily accessible, and notes that pointing end users to a URL that they must access can be a hindrance to effective dissemination of information.⁶⁸ That practice also does not seem a true “point-of-sale” method of disclosure, because the substantive information is not actually there for the end user. Making disclosures readily available and easy to understand are inherently contained in the Transparency Rule and should be fully required.

IV. THE FORTHCOMING RULES SHOULD APPLY BROADLY TO THE ENTIRE TRANSMISSION PATH OF MASS MARKET BROADBAND INTERNET ACCESS

The NPRM suggests that certain classes of service should be exempt from Open Internet rules, and raises again the concept of “reasonable network management” as a business justification or presumption in favor of conduct that otherwise would be unreasonable. CCIA addresses several of these proposed exemptions and standards.

With regard to wireless broadband networks, CCIA believes that the Commission should maintain its oversight of this market.⁶⁹ We are now four years more advanced in our

⁶⁶ See NPRM ¶ 68.

⁶⁷ NPRM ¶ 72.

⁶⁸ *Id.* ¶ 74.

⁶⁹ In its 2010 order, the Commission noted that “mobile broadband presents special considerations” and was at that time “an earlier-stage platform than fixed broadband, and it is rapidly evolving.” GN Docket No. 09-191, *Preserving the Open Internet*, Report and Order, FCC

wireless broadband networks, including mobile services, than we were during the last phase of the Open Internet discussion, and this market has seen increased wireless-wireline vertical integration. In addition, more Americans are relying on mobile broadband as a means of Internet access.⁷⁰ The Commission should monitor the extent to which open Internet protections are warranted for mobile wireless Internet access.

A. The “Reasonable Network Management” Standard Should Be Narrow and Ensure That Only Legitimate *Network*, Rather Than *Commercial*, Reasons Will Justify Questionable BIAP Conduct

CCIA has never disputed that the operators of broadband Internet access service must be permitted to protect their networks from misuse, congestion, and structural harm.⁷¹ CCIA agrees that BIAPs should have a means to rebut, or justify, allegations of unlawful traffic manipulation. They should be able to protect and promote legitimate network management practices.

What CCIA cautioned the Commission, however, was not to establish a “reasonable network management” standard that would authorize service providers to act as “gatekeepers of

10-201, 25 FCC Rcd. 17905, 17956 ¶ 94 (rel. Dec. 10, 2010) (“2010 Order”).

⁷⁰ American consumers increasingly rely on mobile devices for broadband Internet access. E.g., Christina Warren, *In the Net Neutrality Fight, Don’t Forget Mobile*, MASHABLE (May 15, 2014), available at <http://mashable.com/2014/05/15/mobile-broadband-net-neutrality-fcc/> (“Here’s why [treating mobile broadband separately is] problematic: Mobile broadband is improving by leaps and bound. The proliferation of 4G LTE over the last three years has had a transformative effect on how consumers use mobile devices.”); Ericsson, BRINGING THE NETWORKED SOCIETY TO LIFE at 8 (2012), available at http://www.ericsson.com/thecompany/investors/financial_reports/2012/annual12/sites/default/files/download/pdf/English%20Complete%2011th%20March.pdf (“The number of mobile broadband subscriptions is increasing rapidly, from approximately 1.5 billion in 2012, to an estimated 6.5 billion in 2018. ... By the end of 2018, we estimate that both mobile PCs and smartphones will generate four times as much data per device per month as today.”).

⁷¹ E.g., GN Docket No. 09-191, Comments of CCIA at 10-12 (Jan. 14, 2010).

contested speech”⁷² or could be used as “a subterfuge by which the desired net neutrality protections will be eviscerated.”⁷³ This new standard must be tailored carefully, because it will act as a complete defense to any allegations of network malfeasance. It must be fair to *both* BIAPs *and* end users.

Now, it is inescapably true that “reasonable” network management may vary somewhat from technology to technology and platform to platform. CCIA agrees that the Commission should account for real, quantifiable differences between types and methods of broadband Internet access services.

The key, then, to prescribing a “reasonable network management” standard that is limited but workable is to emphasize the requirement that the conduct serve a “legitimate” purpose. The definition of “legitimate” is that which is required to protect the BIAP’s *network integrity*, in whatever tangible form that network is built. CCIA therefore supports the standard proposed in the NPRM:

“A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.”⁷⁴

CCIA asks, however, that the Commission make clear that this “reasonable network management” standard *will not allow* a BIAP to impose its own *commercial preferences or ownership affiliations* with respect to data sources or content in the guise of making network

engineering decisions. Anticompetitive leveraging is not “legitimate network management”.

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⁷² CCIA 2010 Comments at 22.

⁷³ *Id.* at 11.

⁷⁴ NPRM ¶ 61.

will become a bludgeon with which carriers beat down legitimate complaints about unreasonable traffic manipulation.

B. The Rules Should Focus on the BIAP-End User Relationship

As explained in Section II. above, the focus in this proceeding should be on the way that subscribing end users are treated by their BIAP. The transmission path supplied by the BIAP in that relationship is undoubtedly within its control, is a telecommunications service, and is the means by which consumers retrieve and upload Internet platforms, data, and applications. The forthcoming rules should maintain that focus.

The Commission's attention to edge providers, and to defining the relationship between edge providers and BIAPs, distracts from the core task in this proceeding: ensuring that end users can access, download, and upload the applications and content of their choosing which will let end-user demand "in turn, [lead] to network investments and increased broadband deployment."⁷⁵ This distraction seems to have begun within the D.C. Circuit's review of Verizon's appeal of the *2010 Order*, when briefs and oral argument became engulfed in a torturous debate as to the relationship between an end user's hometown BIAP and myriad edge providers located remotely throughout the country. Suddenly the Commission had to prove – once it was established that No-Blocking and No-Discrimination are classic common-carrier obligations – that BIAPs did, in fact, know the edge providers, or should be deemed to know them, and that a certain level of contractual privity exists between BIAPs and the third-party edge providers of which the BIAPs are actually or constructively aware.⁷⁶ The labyrinthine analysis carried over to the NPRM

⁷⁵ NPRM ¶ 26.

⁷⁶ E.g., *Verizon 2014*, 740 F.3d at 652-53.

The Commission's explanation in the Open Internet Order for why

in which the Commission devotes completely separate sections to the relationship between individual consumers' BIAPs and third-party edge providers.⁷⁷

The answer to all of this is quite simple: focus on the relationship between BIAPs and their own end users. Individual end users must be treated fairly by their BIAPs, and edge providers must be treated fairly by their own BIAPs. The information and applications they choose to access and upload should be not treated as lesser than the information and applications accessed and uploaded by any other end user. As stated above, the entire Internet transmission path owned or controlled by each BIAP should be subject to the rules.

This solution also easily resolves any lingering doubt that broadband Internet access is not telecommunications. The transmission path provisioned by a BIAP to an end user is telecommunications "for hire".⁷⁸ The Commission need not worry that the indirect manner in which a BIAP serves a distant edge provider is not "for hire", because it is the relationship between the BIAP and its subscriber, not the BIAP and the distant edge provider, that classifies the service. The service thus becomes no more complex than the common carrier voice, data, and video transmission: each local network provider owes duties to their own subscribers, and thus all

the regulations do not constitute common carrier obligations and its defense of those regulations here largely rest on its belief that, with respect to edge providers, broadband providers are not "carriers" at all. Stating that an entity is not a common carrier if it may decide on an individualized basis "whether and on what terms to deal with potential customers," the Commission asserted in the Order that "[t]he customers at issue here are the end users who subscribe to broadband Internet access services."

⁷⁷ NPRM ¶¶ 75-76 (Transparency Rule), ¶¶ 97-99 (how to ensure "minimum level of access" for edge providers).

⁷⁸ See *Verizon 2014*, 740 F.3d at 654.

subscribers are protected. Redirecting the Commission's focus away from edge providers and back to consumers makes it even more clear that Title II is the correct statutory authority here.

Maintaining focus on BIAP end users does not, of course, resolve every issue in this proceeding. As is further explained in Section IV.D below, Internet interconnection points where every other data stream connects to the BIAP's network are key, because disputes and holdups that occur there will most certainly affect end users' online experience as surely as program access and retransmission disputes result in sports blackouts in the pay TV context. For this reason, whether in this docket or another, the Commission cannot avoid the question whether to mandate nondiscriminatory interconnection.

C. The Commission Must Find a Clear, Narrowly Applicable Definition of "Specialized Services" Prior to Affording Them Exemptions

The Commission continues to struggle with the concept of "Specialized Services" as a valid exemption from Open Internet protections. In 2010, the Commission was unable to arrive at a credible definition of "Specialized Services,"⁷⁹ and CCIA could think of none.⁸⁰ The Commission thus had to choose the less active option of "closely monitor[ing] the robustness and affordability of broadband Internet access services, with a particular focus on any signs that specialized services are in any way retarding the growth of or constricting capacity available for broadband Internet access service."⁸¹

⁷⁹ 2010 Order, 25 FCC Rcd. at 17965-66 ¶¶ 113-14.

⁸⁰ "CCIA is concerned that the proposed exceptions for "managed or specialized services" might inadvertently undermine the Commission's laudable goals. Accordingly, CCIA urges the Commission to avoid creating an exception for this poorly defined class of services" CCIA 2010 Reply Comments at 18.

⁸¹ 2010 Order, 25 FCC Rcd. at 17966 ¶ 114.

The Commission is not likely to be able to form any better definition of “Specialized Services” in this phase of its consideration, and thus CCIA continues to caution against creating an exception for such services in the forthcoming rules. In fact, CCIA desires a more affirmative approach here – rather than look for ways to exempt services from the rules, we should create an affirmative understanding of what Open Internet requires from BIAPs. We believe that BIAPs should be required to provide consistent and non-discriminatory service to all mass market end users within the existing service plans to which the end users subscribe. BIAPs should be required to use best efforts to fulfill their duty as paid telecommunications providers.

CCIA is inclined to believe; however, that the “reasonable network management” qualification would cover a situation in which a subscriber demands a truly exceptional type and level of service, and that the Commission’s allowance for a “legitimate network management purpose” (*see* Section IV.A above) protects the BIAP from an unfair standard of scrutiny. If, however, a truly “specialized” service is devised by a BIAP in response to a unique or nearly unique customer request, then it may be appropriate for the Commission to apply a “Specialized Service” exemption.

At this time, however, when the Commission is beginning again from scratch to establish clear and effective Open Internet protections, devoting resources to address hypothetical outlier examples of “Specialized Services” would be, as it was in 2010, imprudent.

D. Points of Interconnection Along Internet Transmission Paths Are No Less Important for Ensuring Service Integrity and Should Be Protected By Open Internet Rules

The Commission has tentatively concluded that it should “maintain” the exemption it created in the 2010 *Open Internet Order* for “paid peering, content delivery network (CDN)

connection, or any other form of inter-network transmission of data, as well as provider-owned facilities that are dedicated solely to such interconnection.”⁸²

CCIA does not believe that the Commission should adopt such a sweeping exemption. Relinquishing oversight over points of carrier interconnection could nullify the protections of No-Blocking and No-Discrimination completely. And because, as CCIA demonstrated in Section II.A above, Internet access transmissions are telecommunications, carriers are required to carry traffic with pure indifference (absent danger to the network) and without discrimination. Points of interconnection are covered by that same obligation. Traffic manipulation, which includes the failure to properly deploy and utilize the facilities required for interconnection, should be a presumptive violation of the Open Internet rules.⁸³

In addition, as explained in Section III.A above, network scarcity means that Internet transmission paths must be treated equally and consistently. Points of interconnection are key parts of that path. If a transmission path is protected only at the “last mile” to the end user, but can be grossly manipulated deeper into the network, then that “last mile” protection is of no use. And that BIAP would have evaded the Open Internet regime entirely. This proceeding, even if it results in a well-supported and clear set of rules, would have been for naught.

In addition, a blanket exemption for points of interconnection would render the ongoing *IP Transition* docket moot.⁸⁴ The purpose of that proceeding is to ensure that the

⁸² NPRM ¶ 59.

⁸³ As explained in Section III.A above, “individualized agreements”, including payment for network enhancements, likewise should be subject to oversight and principles of reasonable and nondiscriminatory treatment.

⁸⁴ E.g., GN Docket No. 13-5, *Technology Transitions*; GN Docket No. 12-353, *AT&T Petition to Launch a Proceeding Concerning TDM-to-IP Transition*, Order, Report and Order, and Further Notice of Proposed Rulemaking, FCC 14-5 (rel. Jan. 31, 2014).

transition to an all-IP telecommunications network does not impede competition, preclude additional interconnection, or degrade end user service.⁸⁵ An exemption granted in this proceeding for points of interconnection would essentially end the *IP Transition* discussion. The Commission, by that exemption, would have impliedly stated that carriers are to be unregulated in the way they interconnect IP networks.⁸⁶ At the very least, the Commission would be in danger of adopting two inconsistent sets of rules, thus prolonging the confusion for investors, entrepreneurs, backbone providers, CDNs, and consumers as to how broadband Internet access must be provisioned in the Digital Age. Thus, in addition to creating an exemption that swallows the new Open Internet rules, the Commission would imperil an equally important proceeding.

The Commission therefore should not simply re-adopt the 2010 exemption for “peering, paid peering, content delivery network (CDN) connection, or any other form of inter-network transmission of data” as proposed.⁸⁷ BIAPs should be fully accountable for all segments of the Internet transmission paths that they own or control.

⁸⁵ But change on this scale can also be disruptive. Customer expectations may become unsettled, established business models may crumble as the assumptions on which they are built become outdated, and the rules of the road may be called into question through the uncertain application of existing rules to new technologies.

Id. ¶ 15.

⁸⁶ See Kevin Werbach, *No Dialtone: The End of the Public Switched Telephone Network*, 66 FCBA L.J. 203, 236-44 (2014) (“The major incumbent telephone companies argue that the competitive concerns that motivated interconnection obligations for the PSTN are unnecessary for IP services. Competition, however, may not be a sufficient check.”).

⁸⁷ NPRM ¶ 59.

V. THE COMMISSION SHOULD ENFORCE THE FORTHCOMING RULES WITH FINAL, BINDING ORDERS HAVING PRECEDENTIAL EFFECT

The Commission places “legal certainty” as its foremost goal with respect to enforcing the forthcoming Open Internet rules.⁸⁸ CCIA concurs with that emphasis and reiterates that the express identification of Title II authority for broadband Internet access will itself provide legal certainty. Title II brings with it sections 201, 202, and 208, with both formal and informal adjudication mechanisms already having been long in place, and obviates the need to construct and establish, from whole cloth, the novel procedural mechanisms proposed in the NPRM.⁸⁹

CCIA does not support any proposed enforcement mechanism that would not result in final Commission action having the force of law and *stare decisis* effect. Certainty can be achieved only through these well-established means. Thus, although CCIA understands the Commission’s additional goal of “flexibility” in its approach to enforcement,⁹⁰ it does not believe that addressing complaints on a “case-by-case basis” using “the totality of the circumstances”⁹¹ will result in either efficiency or clarity. Rather, this approach would give the industry no certainty and be a tremendous inhibitor to investment. Moreover, it would give the Enforcement Bureau no guidance and would make every complaint a new, unique, and burdensome endeavor. “Flexibility” as described in the NPRM would serve no one.

Of course the question of traffic manipulation is complex and requires fact-intensive analysis. And any tribunal can only try the facts before it in any particular case. CCIA’s concern, however, is that an express commitment to “case-by-case” review will become an equally

⁸⁸ NPRM ¶ 163.

⁸⁹ *Id.* ¶¶ 166, 167, 174-76.

⁹⁰ *Id.* ¶¶ 168-69.

⁹¹ *Id.* ¶ 168.

express eschewing of the precedential value of any subsequent decision. That process will provide no certainty at all, neither to the litigants nor to the industry. The Commission instead should rely on the well-established section 208 adjudicative process and afford the resultant decisions a certain weight of common law as to its analysis and interpretation of applicable law.

In keeping with this principle, CCIA would dissuade the Commission from creating new, *ad hoc* enforcement mechanisms such as “Multistakeholder Processes”.⁹² Although CCIA agrees that the Commission should listen to as many knowledgeable, interested parties as reasonably possible, if for no other reason than that the Administrative Procedure Act requires it,⁹³ CCIA respectfully submits that this rulemaking *is* the “Multistakeholder Process”. Once rules are adopted, the next required action is enforcement. A “multistakeholder” tribunal cannot provide effective enforcement.

With regard to the “Non-Binding Staff Opinions”, CCIA again appreciates the Commission’s commitment to communicating openly with interested parties but fears that any such missives from Staff will have no legal effect. It is bedrock administrative law that the statements of an agency’s staff persons lack any force of law, as the “non-binding” modifier itself indicates. Staff advisories may have an educational value for both the industry and end users, but they could never serve as the basis of any investigation, let alone liability. They would give end users no secure rights. The Commission, the industry, and end users thus would be better served by placing principal reliance on existing adjudicatory procedures – section 208 – when enforcing the forthcoming Open Internet rules.

⁹² NPRM ¶ 175.

⁹³ 5 U.S.C. § 553(a)(3).

CONCLUSION

CCIA urges the Commission to reclassify broadband Internet access services as Title II telecommunications and adopt both a No-Blocking and a No-Discrimination rule, along with an enhanced Transparency Rule, that are enforceable via established section 208 procedures and having both binding and precedential effect.

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Respectfully submitted,

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